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15

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
AT YAKIMA**

16 MICHAEL SCOTT BRUMBACK,  
17 an individual, et al.,

18 Plaintiffs,

19 v.

20 ROBERT W. FERGUSON, in his  
21 official capacity as Washington  
22 State Attorney General, et al.,

Defendants.

NO. 1:22-cv-03093-MKD

DECLARATION OF  
SAUL CORNELL IN  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR INJUNCTIVE AND  
DECLARATORY RELIEF

NOVEMBER 23, 2022  
With Oral Argument: 11:00 a.m.

I, Saul Cornell, declare under penalty of perjury under the laws of the United States that the information in this declaration is true:

1. I am over the age of 18, competent to testify as to the matters in my declaration, and make this declaration based on my personal knowledge.

2. I am the Paul and Diane Guenther Chair in American History at Fordham University. The Guenther chair is one of three endowed chairs in the

1 history department at Fordham and the only one in American history. In addition  
2 to teaching constitutional history at Fordham University to undergraduates and  
3 graduate students, I teach constitutional law at Fordham Law School. I have been  
4 a Senior Visiting research scholar on the faculty of Yale Law School, the University  
5 of Connecticut Law School, and Benjamin Cardozo Law School. I have given  
6 invited lectures, presented papers at faculty workshops, and participated in  
7 conferences on the topic of the Second Amendment and the history of gun  
8 regulation at Yale Law School, Harvard Law School, Stanford Law School, UCLA  
9 Law School, the University of Pennsylvania Law School, Columbia Law School,  
10 Duke Law School, Pembroke College Oxford, Robinson College, Cambridge,  
11 Leiden University, and McGill University.<sup>1</sup>

12 3. My writings on the Second Amendment and gun regulation have been  
13 widely cited by state and federal courts.<sup>2</sup> My scholarship on this topic has appeared  
14 in leading law reviews and top peer reviewed legal history journals. I authored the  
15 chapter on the right to bear arms in the Oxford Handbook of the U.S. Constitution  
16 and co-authored the chapter in The Cambridge History of Law in America on the  
17 Founding Era and the Marshall Court, the period that includes the adoption of the  
18 Constitution and the Second Amendment. Saul Cornell, *The Right to Bear Arms*, in

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<sup>1</sup> For a full *curriculum vitae* listing relevant invited and scholarly  
21 presentations, *see* Ex. A.

22 <sup>2</sup> For a list of court citations, *see* Ex. B.

1      *The Oxford Handbook of the U.S. Constitution* 739–759 (Mark Tushnet, Sanford  
2      Levinson & Mark Graber eds., 2015); Saul Cornell & Gerald Leonard, *Chapter*  
3      *15: The Consolidation of the Early Federal System*, in 1 *The Cambridge History of*  
4      *Law in America* 518–544 (Christopher Tomlins & Michael Grossberg eds. 2008).  
5      Thus, my expertise not only includes the history of gun regulation and the right to  
6      keep and bear arms, but also extends to American legal and constitutional history  
7      broadly defined.

8              4.      From its outset the Second Amendment recognized both the right to  
9      keep and bear arms and the right of the people to regulate arms to ensure public  
10     safety and order. Although rights and regulation are often cast as antithetical in the  
11     modern gun debate, the founding generation saw the two goals as complementary.  
12     Without robust regulation of arms, it would have been impossible to implement the  
13     Second Amendment and its state analogues, which required government to identify  
14     members of the militia, take stock of their weapons, and assess their competency  
15     with their use. H. Richard Uviller & William G. Merkel, *The Militia and the Right*  
16     *to Arms, or, How the Second Amendment Fell Silent* 150 (2002) The lengthy militia  
17     statutes enacted by the individual states and the First Congress, among the longest  
18     and most detailed laws enacted in early America, testify to this fact. Saul Cornell  
19     and Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun*  
20     *Control*, 73 Fordham L. Rev. 487 (2004)<sup>3</sup> These laws defined who was part of the

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22              <sup>3</sup> Discussing the requirements regarding inspection and mustering imposed

1       militia, who was excused from duty, and what weaponry the citizens were required  
2       to procure to meet this obligation, and listed penalties for violating these  
3       provisions.<sup>4</sup> E.g., Act of May 8, 1792, 1792 Conn. Pub. Acts 440 (forming the state  
4       militia); Act of July 19, 1776, ch. I, 1775–1776 Mass. Acts 15 (regulating the  
5       militia of Massachusetts); Act of Apr. 3, 1778, ch. 33, 1778 Laws of N.Y. 62  
6       (regulating the militia of New York State); Act of Mar. 20, 1780, ch. CLXVII,  
7       1780 Pa. Laws 347 (regulating the militia of Pennsylvania); Act of Mar. 26, 1784,  
8       1784 S.C. Acts 68 (regulating militia of South Carolina).

9           5. It is impossible to make sense of the numerous laws enacted by the  
10       founding generation and later generations to preserve the peace without  
11       recognizing that the right to keep and bear arms was understood to further the goals  
12       of ordered liberty, not undermine them. The founding generation did not oppose  
13       government regulation and would have been astonished by the view that regulation  
14       was antithetical to liberty. Early American firearms regulation carried forward a  
15       tradition inherited from English common law in which the right of self-defense was  
16       regulated to preserve the peace and promote public safety. The individual states  
17       enacted a variety of laws: disarming dangerous person, regulating public carry,  
18       imposing safe storage requirements, and compelling those capable of bearing arms

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21       on members of the militia.  
22

1 to purchase their own weapons for mandatory militia service.<sup>5</sup>

2       6.     In the decades after the adoption of the Second Amendment, firearms  
3 regulation increased dramatically. The nineteenth century witnessed an expansion  
4 of regulation in response to new and unprecedented problems created by firearms.  
5 This formative period of American law, the era of the Marshall Court, witnessed  
6 the emergence of a distinctive body of police-power jurisprudence by state and  
7 federal courts. The power to regulate firearms and gunpowder has always been  
8 central to the police power and historically was shared by states, local  
9 municipalities, and to some extent the federal government (when administering  
10 federal land and buildings). Harry N. Scheiber, *State Police Power*, Encyclopedia  
11 of the American Constitution 1744 (Leonard W. Levy et al. eds., MacMillan 4th  
12 ed. 1986). The adoption of the Constitution and the Bill of Rights did not deprive  
13 states of their longstanding police powers. Indeed, ratification was only possible  
14 because Federalists offered their Anti-Federalist opponents firm assurances that  
15 the new government would not, and could not, threaten the individual states'  
16 police-power authority. Federalists and Anti-Federalists disagreed over many legal  
17 issues, but one point on which there was broad agreement was that the federal

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19       5 In many cases states recognized that minors would need to have such  
20 weapons purchased by parents or legal guardians, *see* Saul Cornell, "Infants" and  
21 *Arms Bearing in the Era of the Second Amendment: Making Sense of the Historical*  
22 *Record*, 39 Yale L. & Pol'y Rev. Inter Alia 1 (2021).

1 Constitution did not encroach on the traditional police powers of the individual  
2 states. “Brutus,” a pseudonym used by a leading Anti-Federalist, emphatically  
3 declared that “[I]t ought to be left to the state governments to provide for the  
4 protection and defence [sic] of the citizen against the hand of private violence, and  
5 the wrongs done or attempted by individuals to each other . . . .” Federalist Tench  
6 Coxe concurred, asserting that: “[t]he states will regulate and administer the  
7 criminal law, exclusively of Congress.” States, he assured the American people  
8 during ratification, would continue to legislate on all matters related to the police  
9 power, “such as unlicensed public houses, nuisances, and many other things of the  
10 like nature.”<sup>6</sup> The application of the police power to firearms and ammunition was  
11 singled out as the *locus classicus* of state police power by Chief Justice  
12 John Marshall in his discussion of laws regulating gunpowder in *Brown v. Maryland*, where he stated that “[t]he power to direct the removal of gun powder  
13 is a branch of the police power.” *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419  
14 (1827)

16           7.     Although there is a growing body of scholarship in the field of legal  
17 and constitutional history and the history of firearms regulations, Second

1 Amendment scholarship is a relatively young field compared to other well studied  
2 sub-fields of constitutional and legal history.

3       8. One important difference between research on the history of firearms  
4 regulation, in contrast to other subfields of law, is that there is no Westlaw-like  
5 searchable database for this topic. The most important collection of sources in a  
6 digital and searchable format, the Duke Firearms Research Center Repository of  
7 Historical Gun Laws, is a useful starting point for research in this area, but the  
8 collection has serious gaps and has not been substantially updated since its  
9 inception in 2019. The Duke collection contains only a smattering of the many  
10 local ordinances that proliferated during the era of the Fourteenth Amendment's  
11 ratification and are a key part of the historical inquiry required by *Bruen*. *New York*  
12 *State Rifle & Pistol Ass'n v. Bruen*, \_\_ U.S. \_\_, 142 S. Ct. 2111 (2022). Although  
13 some of these missing materials are available from other online sources, in many  
14 other cases one must travel to the location of these historical archives, rare book  
15 libraries, and other repositories of primary sources and do the research on site to  
16 locate the relevant materials.

17       9. In short, research on historical gun regulation is time-consuming, far  
18 more so than many other areas of legal history where many “one-stop shop” digital  
19 collections, most notably Westlaw and Hein-Online, have made some of the  
20 traditionally arduous tasks of legal research and writing less cumbersome and labor  
21 intensive. Given that one must combine research in the existing digital sources with  
22 more traditional and time-consuming primary source research in archives and rare

1 book collections, the inquiry required by *Bruen* is both more labor-intensive and  
2 time-consuming than other forms of legal research typically associated with  
3 constitutional litigation. In the years since *District of Columbia v. Heller*, 554 U.S.  
4 570 (2008) was decided, a burgeoning body of scholarship has started to remedy  
5 this deficiency, but new materials and scholarship continue to emerge slowly,  
6 expanding our understanding of the scope of arms regulation in the Anglo-  
7 American legal tradition. Still, much work needs to be done to fill out this picture.

8 10. The methods of legal historical research require a deep immersion in  
9 the primary source materials, conscious attention to the limits and strengths of  
10 various types of legal sources, and a broad knowledge of related historical  
11 subfields. In addition to a familiarity with legal history, one must canvass other  
12 subfields such as military history, social history, the history of criminal law to  
13 implement *Bruen*'s directive to evaluate the context in which particular laws were  
14 passed and the underlying societal concerns driving these efforts to mitigate the  
15 harmful effects of guns.<sup>7</sup> To avoid approaching history, text, and tradition with an

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17 7 For a discussion of the minimum standard for undergraduate history  
18 majors, see Mary Lynn Rampolla, *A Pocket Guide To Writing In History* 18 (8th  
19 ed., 2015). For a primer written for graduate students, see Martha Howell & Walter  
20 Prevenier, *From Reliable Sources: An Introduction to Historical Methods* 128  
21 (2001). On the methods of professional legal history, see generally *The Oxford*  
22 *Handbook Of Legal History* (Markus Dirk Dubber and Christopher L. Tomlins,

1 “ahistorical literalism” it is vital to survey historical scholarship across a broad  
2 range of subfields.<sup>8</sup> *Franchise Tax Bd. Of Cal. v. Hyatt*, 139 S. Ct. 1485, 1498  
3 (2019). Social history, cultural history, economic history, and military history all  
4 shed important light on the original meaning of the Second Amendment. One must  
5 avoid the common tendency, closely associated with “law office history,” to treat  
6 sources in isolation, decontextualized, floating freely, detached from the web of  
7 historical meaning that originally made them comprehensible to Americans in  
8 1791, and ignoring the way specific pieces of evidence fit together to form a  
9 coherent whole.<sup>9</sup> J.H. Hexter, *Reappraisals in History* 194–45 (1961). Any effort  
10 to understand the Second Amendment and the history of American gun regulation  
11 must therefore canvass a variety of historical topics, not traditionally part of  
12 litigation, including such diverse subfields as legal history, social history, cultural  
13 history, economic history, and military history.<sup>10</sup>

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14  
15 eds., 2018). On the methods of originalism, *see* Keith E. Whittington,  
16 *Originalism: A Critical Introduction*, 82 Fordham L. Rev. 375 (2013). One the  
17 proper role of history in constitutional law, *see generally* Richard H. Fallon Jr., *The*  
18 *Many and Varied Roles of History in Constitutional Adjudication*, 90 Notre Dame  
19 L. Rev. 1753 (2015).

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21  
22 <sup>10</sup> The best illustration of the breadth of approaches adopted by modern legal  
historians of the United States is the three volume *Cambridge History of Law in*

1           11. Finally, much of the writing on the topic of the Second Amendment  
2 and gun regulation is highly partisan and has been produced by activists with close  
3 ties to political advocacy groups. In contrast to other thriving fields of legal  
4 history, such as the history of federalism or the First Amendment, the number of  
5 professional legal historians working on the history of gun regulation remains  
6 small. One consequence of this fact is that any claim or citation made in the existing  
7 law review literature must be carefully scrutinized for its historical accuracy and  
8 potential ideological bias. Typically, in less contentious and ideologically charged  
9 sub-fields of the law, one can spot-check citations in the “scholarly” literature and  
10 largely trust that historical claims are generally accurate, but this is not true in the  
11 field of Second Amendment “scholarship.” Vetting particular claims and checking  
12 sources is therefore essential and further increases the amount of time needed to  
13 conduct reliable historical research.

14           12. Although I could and likely will spend years on research in this area,  
15 I recognize that litigation is not scholarship and cannot await the development of  
16 the most complete and accurate answers possible. I anticipate it will take me  
17 approximately six to nine months to delve deeply enough into the areas outlined  
18 above to formulate an expert report.

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21           *America. See generally The Cambridge History of Law in America* (Michael  
22 Grossberg & Christopher L. Tomlins eds., 2008).

1 I declare under penalty of perjury under the laws of the State of  
2 Washington and the United States that the foregoing is true and correct.  
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4 DATED this 21 day of October 2022 at Bronx, New York.  
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*Saul Cornell*

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Saul Cornell

DECLARATION OF SAUL  
CORNELL IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
INJUNCTIVE AND DECLARATORY  
RELIEF – NO. 1:22-cv-03093-MKD

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1 **PROOF OF SERVICE**

2 I hereby certify that I electronically filed the foregoing with the Clerk of  
3 the Court using the CM/ECF System, which in turn automatically generated a  
4 Notice of Electronic Filing (NEF) to all parties in the case who are registered  
5 users of the CM/ECF system.

6 I declare under penalty of perjury under the laws of the United States of  
7 America that the foregoing is true and correct.

8 DATED this 24th day of October 2022 at Seattle, Washington.

9 *s/ Andrew Hughes*  
10 ANDREW HUGHES, WSBA #49515  
11 Assistant Attorney General